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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO BAUTISTA,

Defendant and Appellant.

G039945

(Super. Ct. No. 05WF2449)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant contends the trial court erred in instructing the jury with CALCRIM Nos. 223, 226 and 302. We reject these contentions and affirm the judgment.

I

FACTS

A jury found defendant Gilberto Bautista guilty of murder, and found it to be true that in committing the murder he discharged a firearm within the meaning of Penal Code section 12022.53, subdivision (d),¹ and personally used a firearm within the meaning of section 12022.5, subdivision (a). The jury also found defendant guilty of possession of a firearm by a felon and street terrorism. But the jury did not find it to be true the special circumstance that the murder was committed for a criminal street gang purpose within the meaning of section 190.2, subdivision (a)(22), or that either the murder or the possession of a firearm by a felon crime was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The court sentenced defendant to 50 years to life in prison.

Victor Ortega-Casas testified he went to Stanton Park on an “almost daily” basis during the summer of 2005 to play soccer. He saw defendant there two or three times. He saw defendant take a revolver and a handful of bullets from his pockets. Ortega-Casas heard defendant say about a man named Caballo² that he “didn’t want to see him again in the park because he was going to shoot him.” Ortega-Casas said he heard defendant say he gave Caballo money to buy drugs and he didn’t return.

During the evening of August 17, 2005, Ortega-Casas spoke with Caballo in the park. Then Ortega-Casas saw Caballo walk away, “and after 20, 30 seconds I saw just like a flash from a pistol.”

¹ All further statutory references are to the Penal Code.

² The record reflects that Caballo is also known as Julio Hernandez.

Jorge Romero Gonzalez was playing soccer at the park on the evening of August 17, 2005. He saw defendant and Caballo there. Gonzalez was retrieving a soccer ball when he heard a shot. He turned in the direction of the shot and defendant was approximately 13 feet away in that direction. Defendant's arm was straight out and Caballo was eight to 10 feet away from defendant on the ground. Caballo bled to death.

Defendant testified in his trial. He said he had a gun with him all day on August 17. He admitted he shot and killed Caballo.

II

DISCUSSION

Defendant argues the court erred in instructing the jury. He contends that “by instructing the jury with CALCRIM [Nos.] 223,³ 226⁴ and 302,⁵ the superior court

³ CALCRIM No. 223 as read to the jury by the court states: “Facts may be proven by direct or circumstantial evidence or a combination of both. [¶] Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony would be direct evidence that it was raining. Circumstantial evidence may also may be called indirect evidence. Circumstantial evidence does not directly prove a fact to be decided as evidence of another fact or group of facts for which you may conclude the truth of the fact in question. For example, if a witness testifies he saw someone coming inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable as a type of evidence to prove or disprove the elements of a charge, including the intent and mental state and acts necessary to a conviction. And neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other, and you must decide whether a fact in issue has been proved based upon all the evidence.”

⁴ CALCRIM No. 226 as read to the jury by the court states: You alone, must judge the credibility and believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. [¶] Testimony of each witness must be judged by the same side — by the same standard. You must set aside any bias or prejudice you may have, including any bias based upon witness's gender, race, religion or national origin. [¶] You may believe all, part, or none of any of the witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors you may

prejudicially undermined the presumption of innocence to which [defendant] was entitled and unconstitutionally shifted the burden of proof to [defendant].”

In deciding whether or not jury instructions correctly conveyed the law, the reviewing court must look to the instructions as a whole to see whether there is a reasonable likelihood the jury misunderstood the instructions. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.) Jurors are presumed to be intelligent people capable of understanding and correlating jury instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

consider are how well do the witnesses see, hear, or otherwise perceive the matters about which the witness has testified, how well was the witness able to remember and described what happened, what was the witness’s behavior while testifying, did the witness understand the questions and answer them directly, was the witness’s testimony influenced by a factor such as bias or prejudice or a personal relationship with someone involved in the case or personal interest in how the case is decided, what was the witness’s attitude about the case and about testifying, did the witness make a statement in the past that is consistent or inconsistent with his or her testimony, how reasonable is the testimony when you consider all the other evidence in the case, did other evidence prove or disprove any fact about which the witness testified, did the witness admit to being untruthful. [¶] Do not automatically reject testimony just because of inconsistency or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things and make mistakes about what they remember. Also, two or more persons may witness the same event and see or hear it differently. If you do not believe a witness’s testimony that he or she no longer remembers something, that testimony is inconsistent with the witness’s earlier statements on the subject. [¶] If you decide a witness has deliberately lied about something significant in this case, you should consider not believing anything the witness says. Or if you think the witness lied about some things but told the truth about others, you may simply accept that part you think is true and ignore the rest.”

⁵ CALCRIM No. 302 as read to the jury by the court states: “If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of a greater number of witnesses. [¶] On the other hand, do not disregard the testimony of a greater number of witnesses without a reason or because of some feeling of prejudice or desire to favor one side or the other. What is important is whether the testimony or other evidence convinces you, not just the number of witnesses who have testified about a certain point.”

In CALCRIM No. 223, defendant objects to the following language, “to prove or *disprove* the elements of a charge.” He says reference to disproving the elements of a charge “improperly suggests that the defense must disprove a charge to warrant acquittal.” Defendant’s jury was also instructed with CALCRIM No. 220 in which it was told he was presumed to be innocent, and that presumption “requires that the People prove a defendant guilty beyond a reasonable doubt.”

Defendant contends CALCRIM No. 226, “instructs jurors that their task is to decide whether they ‘believe’ witnesses and to determine whether the witnesses’ testimony is ‘true and accurate.’ The instruction exacerbates the problem by further instructing jurors that all witness testimony ‘must be judged by the same standard.’” The jury was also instructed with CALCRIM No. 200 that “[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.”

He says CALCRIM No. 302 “tells jurors that in resolving a conflict in the evidence, they ‘must decide what evidence, if any, to believe.’ This instruction’s directive that jurors ‘must decide what evidence, if any, to *believe*’ in case of a conflict is incorrect because exculpatory evidence need not be ‘believed’ in order to raise a reasonable doubt. In other words, if there is a conflict in the evidence, exculpatory evidence that is sufficiently weighty to create a reasonable doubt necessitates acquittal, regardless of whether jurors affirmatively *believe* that evidence.” But CALCRIM No. 220 told the jury: “Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

Defendant parses the language of the instructions to construct his argument he has been denied due process and a fair trial. Similar arguments about the same instructions have been rejected in *People v. Golde* (2008) 163 Cal.App.4th 101, *People v.*

Ibarra (2007) 156 Cal.App.4th 1174 and *People v. Anderson* (2007) 152 Cal.App.4th 919.

Defendant's claims are not well taken. "Because the instructions given were correct statements of the relevant legal principles, the purported error was necessarily harmless. [His] jury was neither incorrectly nor inadequately instructed." (*People v. Thomas* (2007) 150 Cal.App.4th 461, 467.)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.